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98-306

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THOMAS W. DOWTY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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100 pp

QUESTION PRESENTED

WHETHER THE FIVE YEAR STATUTORY LIMITATION ON CRIMINAL PROSECUTIONS BY COURTS-MARTIAL, AS ENUMERATED IN ARTICLE 43 OF THE UNIFORM CODE OF MILITARY JUSTICE, AND ANY EXCEPTIONS TO IT, CAN BE EXPANDED WITHOUT EXPRESS STATUTORY LANGUAGE IN THE UNIFORM CODE OF MILITARY JUSTICE PERMITTING SUCH EXPANSION ?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE ARMED FORCES

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Armed Forces, *United States v. Dowty*, 48 M.J. 102 (1998), affirming the decision of the Navy-Marine Corps Court of Criminal Appeals is reprinted as Appendix A at Pet. App. 1a.

The opinion of the Navy-Marine Corps Court of Criminal Appeals, *United States v. Dowty*, No. 96-1535 (N.M.Ct. Crim. App., May 6, 1997) is reprinted as Appendix B at Pet. App. 41a. The findings of fact of the trial court are reprinted as Appendix C at Pet. App. 58a.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals on May 22, 1998 (Appendix A at Pet. App. 1a.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, provides, in relevant part:

> The Congress shall have power... To make rules for the government and regulation of the land and naval forces[.]

STATEMENT OF THE CASE

On September 28, 1993, Dorothy Dowty, the former wife of Petitioner, alleged that the Petitioner defrauded the United States, (hereinafter the "Government") by submitting false claims through a fictitious company known as "Health Care Associates." This information was provided to the Government by Dorothy Dowty through a Fraud, Waste and Abuse Hotline maintained by the Department of Defense. Specifically, Dorothy Dowty alleged that while assigned to active duty with the United States Navy, as the Finance Liaison Officer, Orthopaedics Department, National Naval Medical Command (NNMC), Bethesda, Maryland, the Petitioner had allegedly created a consulting company called "Health Care Associates" (also referred to as "Health Advisory Associates") for the purpose of submitting false claims to the Orthopaedic Department at NNMC. The Petitioner was alleged to have obtained approximately $15,000.00 of Government payments through this alleged scheme, which were then alleged to have been deposited into a joint checking account held by the petitioner and his wife, Dorothy Dowty.

As part of its investigation, the

Naval Investigative Service, under the supervision of Agent Vaughn Bradley, obtained, from the Department of Defense Inspector General's Office, a Subpoena Duces Tecum pursuant to the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 *et seq.*, and addressed to the Custodian of Records for the Home Federal Savings Bank in Washington, D.C. The records of that bank indicated that there was a joint checking account held in the name of Thomas W. Dowty and Dorothy Dowty, who at the time of the incidents alleged, had been husband and wife, and an account in the name of Health Care Associates. The Subpoena Duces Tecum requested that Home Federal Savings Bank produce "all accounts in the name of Thomas William Dowty, a U.S. Navy employee, and/or Health Care Associates..." The subpoena was issued on July 27, 1994.

In accordance with the statute, a copy of the subpoena was mailed to Petitioner's last known address on August 1, 1994. After the subpoena was returned without having been forwarded to Petitioner, it was served personally on the Petitioner on September 9, 1994. There is no evidence that the Government ever served a subpoena or other notice to Dorothy Dowty, the other joint holder of

the account. Once served, the Petitioner then filed a motion, on September 15, 1994, in the United States District Court for the District of Columbia, objecting to Government access to his checking account. No objection was made by Petitioner to release of the records of Health Care Associates. The Government never filed a response to the Petitioner's objection or took any other action to enforce its subpoena until ultimately ordered to do so by the District Court on February 7, 1995. Finally, on May 18, 1995, the Petitioner's objection to the subpoena was dismissed by the District Court. The Government waited almost two more months before finally obtaining the subpoenaed records in July, 1995. Ultimately, on January 17, 1996, charges were preferred against the Petitioner.

The charge sheet contained four charges, and a total of sixteen specifications. Twelve of the sixteen specifications were based on acts alleged to have occurred between July 18, 1990 and January 17, 1991. The remaining allegations focused on acts alleged to have been committed after January 23, 1991. Charges were received by the summary court-martial convening authority on January 23, 1996, thereby tolling the

running of the five year statute of limitations under Article 43(b)(1), which provides:

> Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

The charges were then referred to a general court-martial. At a pretrial hearing, the Petitioner moved for dismissal of the twelve specifications citing offenses which were alleged to have occurred more than five years before the receipt of charges by the summary court martial convening authority, thereby violating the statute of limitations provided for in Article 43(b)(1) of the UCMJ.

At trial, the Government conceded that the five year statute of limitations had in fact been breached, but argued that the 8 month and 2 day period during which

the Petitioner's objection to the administrative subpoena against his personal checking account was pending should be excluded from the five year period of limitations. No explanation was given by the Government for its failure to obtain the records of Health Care Associates, for which their access was never impeded. The Government relied upon language contained in the RFPA. The pertinent language states as follows:

> If any individual files a motion or application under this chapter which has the effect of delaying the access of a Government authority to financial records pertaining to such individual, any applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided.

12 U.S.C. § 3419. In the event that eight month and two day period was excluded, the Government argued, all charges and specifications filed against the

Petitioner were filed within the five year statute of limitations. The trial judge disagreed, and dismissed the twelve specifications.

The dismissal was based upon two grounds. The trial judge ruled that the clear language of Article 43 of the UCMJ "controls the issue of what, if any, periods of time are subtracted from computation of the statute of limitations,"and that no exceptions other than those specifically enumerated in Article 43 allowed for a tolling of the statute of limitations. The RFPA did not fall into one of the enumerated exceptions.

The second basis for the decision to dismiss the charges was the delay in access to the financial records sought by the Government. The trial court ruled that the dilatory actions of the government effectively delayed their access to the financial records of the Petitioner, because the Government did nothing for several months after the objection was filed by the Petitioner, and because the Government could have obtained the records of the joint checking account through the other account holder, Dorothy Dowty, who had originally brought the allegations to the Government's attention.

The Government then filed an interlocutory appeal of the trial court's ruling to dismiss. On review by the Navy-Marine Corps Court of Criminal Appeals, the Government claimed that there was no language in Article 43 indicating that § 3419 of the RFPA did not apply to it, despite clear language in Article 43 which stated "except as otherwise provided in this section (article)" Article 43(b)(1), UCMJ. The Petitioner argued that Article 43 clearly enumerated a statute of limitation which applied to military prosecutions and which was not eradicated by the existence of the RFPA in this case. That court rejected Petitioner's argument and observed that it's decision was intended as a "reconciliation" of the two statutes in conflict. The court then reinstated the dismissed specifications, overturning the ruling of the trial court.

Petitioner then filed a Petition for a Grant of Review to the Armed Forces Court of Appeals, which agreed to hear this case. The Court of Appeals for the Armed Forces rejected Petitioner's claim that Article 43 of the UCMJ required that a strict five year statute of limitations applied to the affected charges and affirmed the lower court ruling. Relying in part on *United States v. Curtin*, 44

M.J. 439 (1996), the Court of Appeals for the Armed Forces held that the RFPA could be applied to protect the privacy interests of servicemembers and the invocation of the rights outlined in the RFPA could then be used to effectively preempt the protection provided in Article 43 of the UCMJ.

In a sharply worded dissent, Judge Cox argued that the decision of the Armed Forces Court of Appeals amounted to nothing less than an expansion by assimilation of an obscure statute intended by Congress to regulate commerce and financial institutions under Article I, Section, 8, Clause 3 of the Constitution into the substantive language of the Uniform Code of Military Justice. Judge Cox expressed further concern that the decision of the Court was a significant digression from the traditional interpretation afforded the Uniform Code of Military Justice, which was to view the UCMJ as the exclusive body of law governing the limitation on the exercise of court-martial jurisdiction.

REASONS FOR GRANTING THE WRIT

THE FIVE YEAR STATUTORY LIMITATION ON CRIMINAL PROSECUTIONS BY COURTS-MARTIAL, AS ENUMERATED IN ARTICLE 43 OF THE UCMJ, AND ANY EXCEPTIONS TO IT, CANNOT BE EXPANDED WITHOUT EXPRESS STATUTORY LANGUAGE IN THE UCMJ PERMITTING SUCH EXPANSION

This Court has long recognized the Uniform Code of Military Justice as a statutory creature which was created by Congress to address the unique responsibilities and demands that exist upon members of the military. As such, "military law is viewed as a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson,* 346 U.S. 137, 140, (1953). The military is viewed as a "specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history." *Parker v. Levy,* 417 U.S. 733, 743, (1974).

Consistent with that view there are many instances in which the President and Congress have created rights for military servicemembers above and beyond those allowed for their civilian counterparts.

In *United States v. Postle*, 20 M.J. 632 (NMCMR 1985), for example, the court noted the expansion of a servicemember's rights against self incrimination as being more expansive than that provided by the Fifth Amendment. The court went on to state that

> ... notwithstanding the interpretative limitations to the exercise of a constitutional or statutory right, Congress and/or the President can require that a more solicitous and expansive rule for the protection of such rights be applied within the military.

Id. at 646.

The Petitioner asserts that such an approach is required in this case. The primary purpose of a statute of limitation is to

> limit the exposure to criminal prosecution to a period certain following commission of a prohibited act, to protect persons from having to defend themselves against charges when the basic facts have become

> obscured by the passage of time, to minimize exposure to punishment for acts committed in the far distant past, and to encourage timely investigation of offenses and prosecution of offenders.

United States v. Lee, 32 M.J. 857, 859 (NMCMR 1991), citing *Toussie v. United States*, 397 U.S. 112, (1970). Any judicial review of "limitations on criminal actions are to be liberally interpreted in favor of repose." *United States v. Habig*, 390 U.S. 222, 227 (1968); *United States v. Scharton*, 285 U.S. 518 (1932).

Article 43 of the UCMJ clearly states that "except as otherwise provided in this section (article)..." (emphasis added) a five year statute of limitations applies to any offense to be tried by a court-martial. Article 43 thereafter lists certain specific exceptions under which the five year statute of limitations can be tolled, extended, or suspended. None of the exceptions outlined in Article 43 refer to the RFPA. Not only does Article 43 clearly not provide for an exception to the five year limitation on prosecution by courts-martial due to invocation by the RFPA, it provides for no exceptions

outside of its own language.

Conversely, the RFPA, by its own terms, does in fact defer to military court-martial procedure regarding access to financial records by government authorities. The RFPA states in part:

> (e) ... Nothing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or **comparable rules of other courts** in connection with litigation to which the Government authority and the customer are parties.

12 U.S.C. § 3413 (e) (emphasis added). In *United States v. Wooten*, 34 M.J. 141 (CMA 1992), the Court of Military appeals, in a concurring opinion by Judge Cox, noted that "nothing in the Right to Financial Privacy Act ... affects court-martial process." Id. at 149.

In the limited number of occasions that the Armed Forces Court of Appeals has addressed the issue of the application of the RFPA to court-martial proceedings, the Court has been careful to limit and restrict any enforcement of the RFPA or

its violations in courts-martial proceedings. *See United States v. Wooten*, 34 M.J. 141 (CMA 1992), *United States v. Jackson*, 25 M.J. 711 (ACMR 1987), and *United States v. Moreno*, 23 M.J. 622 (AFCMR 1986), petition denied, 24 M.J. 348 (CMA 1987).

The one reported occasion in which the application of the RFPA to courts-martial proceedings has arisen in a United States District Court, the court suggested that any enforcement proceedings involving the RFPA should be the exclusive jurisdiction of Article III courts, not Article I courts, *e.g.* courts-martial. *See McDonough v. Widnall*, 891 F. Supp. 1439, 1446-47 (D. Colo. 1995).

Despite that ruling, the Court of Appeals in this case has relied upon its decision in *United States v. Curtin*, 44 M.J. 439 (1996) to suggest that the decision in *McDonough* was erroneous. The court referred to *Curtin* as the military's "leading case" protecting the privacy rights of servicemembers under the RFPA. It is not.

A close analysis of *Curtin* reveals that it was, in fact, a decision interpreting the distinctions between administrative and judicial subpoenas issued pursuant to procedural regulations

under the UCMJ. Furthermore, the information sought by the military prosecutor concerned the financial records of civilians who were not subject to court-martial but were related to the accused servicemember. Therefore, the Armed Forces Court of Appeals never addressed the application of the RFPA to the servicemember himself in the context of the court-martial proceeding. The court merely made a very limited ruling regarding the ability of the military judge to review the appropriateness of judicial subpoenas issued pursuant to the rule of procedure for the UCMJ by the military prosecutor for the bank records of civilian witnesses.

This Court, through its periodic review of the military judicial process, has acknowledged that Congress has:

> plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.

Weiss v. United States, 510 U.S. 163 (1994). The Armed Forces Court of Appeals,

in its review of this case, has acknowledged that while servicemembers are not excepted from the protection of the Constitution,

> the different character of the military community and of the military mission requires a different application of those protections.

Parker v. Levy, 417 U.S. 733, 758 (1974).

Despite that clear guidance from this Court, the Armed Forces Court of Appeals, in this case, apparently concerned that allowing the dismissal of the charges against the Petitioner would create a special status for servicemembers not enjoyed by civilians, stated that if it ruled in favor of Petitioner,

> [servicemembers] could use the RFPA as a sword to bar criminal liability in situations in which their civilian counterparts could not do so.

United States v. Dowty, 48 M.J. 102, 111 (1998).

The Court of Appeals has turned a blind eye to the long and well documented history of military jurisprudence which has indeed provided rights to servicemembers which are greater than those provided to their civilian counterparts. The most profound example is the protection outlined in Article 31 of the UCMJ, which not only provides a general prohibition against self-incrimination, but also a specific warning requirement.

This protection for servicemembers was granted through the original codification of the UCMJ in 1951. That unique protection for servicemembers was recognized quite readily by military appellate courts, fully 13 years before the same principles became applicable to civilians through this Court's ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also United States v. Williams*, 2 USCMA 430, 9 CMR 60 (1953) (holding that an improper warning is per se prejudicial and that statements taken pursuant to defective advice are inadmissible).

The UCMJ has also provided speedy trial protections that, even loosely applied, go further than the Sixth Amendment in ensuring prompt disposition of a military servicemember's case. As a

result, servicemembers have traditionally enjoyed a substantially more rigorous and meaningful right to a speedy trial than their civilian counterparts. *See United States v. Burton*, 21 USCMA 112, 44 CMR 166, 171 (1971).

The reason military servicemembers have traditionally enjoyed greater rights to a speedy trial stems in large part from the unique need in the military to maintain good order and discipline. Thus the military's interest in pursuing and maintaining the deterrent function of criminal law provisions under the UCMJ becomes more important for servicemembers than their civilian counterparts. As previously stated, this is one of the reasons this Court has so consistently viewed military jurisprudence and the UCMJ as embodied with certain distinctions which make it a separate and distinct judicial system, subject to different procedures and jurisdiction requirements.

The opinion of the Armed Forces Court of Appeals belies its obvious fears that reliance upon Article 43 rather than the RFPA in the instant case could result in servicemembers avoiding criminal liability because of protracted litigation over the issuance of subpoenas for financial records. However, such a position ignores

the facts of this case.

In this case the delay in obtaining these records did not stem from any obstreperous tactics by the Petitioner. Rather, it was the utter, absolute, and complete failure of the Government to so much as respond to the Petitioner's objection in the U.S. District Court, for five months, until the inquiries of the Petitioner and order of the Court itself compelled the Government to respond to the objection.

The record is clear that despite the lack of any objection to the release of the financial records of Health Care Associates, the Government made no effort to obtain those records for almost one year after the issuance of the subpoena for them. Thus, the failure to obtain these financial records in a manner which would have allowed the Government to submit timely charges against the Petitioner had nothing to do with the Petitioner, but with the failure of the Government to pursue its investigation in a timely manner.

The Armed Forces Court of Appeals has accused the Petitioner of using the RFPA as a sword. Ironically, by its decision, the Armed Forces Court of Appeals has now permitted the Government to use the RFPA

as a shield to deflect the results of its own inaction in conducting a two and one half year investigation of the Petitioner before submitting charges against him.

Such a result was never intended by the Uniform Code of Military Justice or the Right to Financial Privacy Act. Such a result would conflict with this Court's decisions regarding the purpose of a criminal statute of limitations in general and its specific application to this case.

Until this case, no military or civilian court has addressed the issue of the application of the statute of limitations contained in the RFPA to a court-martial proceeding. The Armed Forces Court of Appeals, in deciding this case, recognized prior rulings made by this Court which clearly established that the Uniform Code of Military Justice is the primary expression of congressional action on the subject of military discipline. The case before this Court now involves a conflict between the Uniform Code of Military Justice and a federal statute which bears no connection, or application, to the military judicial process.

The issue in this case is quite simply whether the specific statutory limitations on criminal prosecutions, (as enumerated in Article 43), in the military

judicial system, may be expanded beyond the Uniform Code of Military Justice without express statutory language in the UCMJ permitting such expansion. The Petitioner submits that this Court has made clear, through its repeated rulings on the applicability of the Uniform Code of Military Justice to courts-martial proceedings, that such a result cannot occur in this case.

Conclusion

Both this Court and the Armed Forces Court of Appeals have repeatedly acknowledged that the Uniform Code of Military Justice establishes an integrated system of investigation, trial and appeal that is separate from the criminal justice proceedings conducted in civilian federal courts. There are intentional differences and separation between the military and civilian judical systems. Despite that, the Armed Forces Court of Appeals has struggled to fit a square peg into a round hole by meticulously crafting an opinion which purports to be a reconciliation of the Right to Financial Privacy Act and the Uniform Code of Military Justice. The Armed Forces Court of Appeals expands the scope and jurisdiction of the UCMJ in a

manner never seen, before or envisioned by Congress when it drafted the UCMJ and the RFPA, the former under its ability to regulate the armed forces, and the latter pursuant to its ability to regulate commerce. This case represents a significant departure from previous rulings by the military appellate courts involving the application of generally applicable federal statutes.

Until now the Armed Forces Court of Appeals has been consistently reluctant to overlay a generally applicable statute upon the military, especially when doing so effectively preempts the rights and protections provided for servicemembers in the Uniform Code of Military Justice.

Consequently, this erroneous decision by the Armed Forces Court of Appeals, if allowed to stand, will forever breach the integrity and unique applicability of the Uniform Code of Military Justice to members of the armed forces. This calls into question the viability of the Uniform Code of Military Justice in future cases of conflict with statutory provisions outside of it. Therefore, this Court should address this issue which has not only adversely affected Petitioner in the case *sub judice*, but also threatens the rights of servicemembers in the future.

Respectfully Submitted

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August 1998

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 97-6001

Crim. App. No. 96 1535

United States, *Appellee*

v.

Thomas W. Dowty, Lieutenant
U.S. Navy, *Appellant* –

Argued October 8, 1997

Decided May 22, 1998

For Appellant: *Lieutenant Jeffrey K. Van Nest*, JAGC, USNR (argued).

For Appellee: *Captain Paul D. Kovac*, USMC (argued); *Colonel Charles Wm. Dorman*,

USMC, *Commander David H. Myers*, JAGC, USN, and *Lieutenant Randy S. Kravis*, JAGC, USNR (on brief).

Opinion of the Court

EFFRON, Judge:

In an appeal under Article 62(a)(1), Uniform Code of Military Justice, 10 USC § 862(a)(1) (1983), the Government asked the Court of Criminal Appeals to review a ruling of the military judge at appellant's general court-martial that the statute of limitations in Article 43(b)(1), UCMJ, 10 USC § 843(b)(1), barred appellant's prosecution on 12 of the 16 specifications alleging false official statements, larceny, forgery, and false claims against the United States, *see* Arts. 107, 121, 123, and 132, UCMJ, 10 USC §§ 907, 921, 923, and 932, respectively. On May 6, 1997, the Court of Criminal Appeals set aside the military judge's dismissal of the affected specifications, thereby permitting trial to proceed on all 16 specifications. 46 MJ 845. On June 19, 1997, the Court of Criminal Appeals denied appellant's timely filed request for reconsideration *en banc*, and the next day appellant filed his petition for review of that decision in this Court. We

granted review. ___ MJ ___ (Daily Journal Sept. 10, 1997). We affirm the decision of the lower court for the reasons discussed below.

I

Appellant, a lieutenant in the Naval Reserve, has been on continuous active duty since June 17, 1981, which includes the period of time covered by the charges, trial, and appellate proceedings in this case. He has been subject to the Uniform Code of Military Justice at all relevant times. *See* Art. 2(a)(1), UCMJ, 10 USC § 802(a)(1).

While serving on active duty in the Medical Service Corps of the Navy, appellant allegedly conducted a private business named Health Care Associates, under which he submitted claims for reimbursement to the National Naval Medical Center at Bethesda, Maryland. The charges in this case allege that the claims submitted by appellant were fraudulent.

On September 28, 1993, the Defense Fraud, Waste, and Abuse Hotline received an anonymous allegation that claims submitted by appellant's company to the

Government between 1989 and 1992 were false and forged; that such claims had resulted in payment by the Government of $15,000 for services that appellant's company never had rendered; and that appellant had deposited the checks paid by the Government for these fraudulent claims into his personal checking account. The caller subsequently was identified as appellant's former wife.

The matter was referred to the Naval Criminal Investigative Service (NCIS), which opened an investigation. During this investigation, NCIS agents determined that it would be necessary to review appellant's bank records, and they requested the Department of Defense Inspector General (DoD IG) to issue an appropriate administrative subpoena under the Right to Financial Privacy Act (RFPA), 12 USC §§ 3401-3422, to the custodian of the bank records of appellant and Health Care Associates. The subpoena was issued on July 27, 1994. *See* 12 USC § 3405.

In accordance with the statute, a copy of the subpoena was mailed to appellant's last known address on August 1, 1994. *See* 12 USC § 3405(2). After the notice was returned without having been forwarded to appellant, it was served

personally on appellant on September 9, 1994.

Appellant, exercising his rights under the statute, 12 USC § 3410, filed a motion on September 15, 1994, in the United States District Court for the District of Columbia challenging the Government's access to the records. Eight months later, the District Court dismissed appellant's motion on May 17, 1995. Pursuant to the subpoena, NCIS obtained appellant's bank records, and the investigation proceeded to completion in mid-December 1995.

Charges were preferred against appellant on January 17, 1996. The charge sheet contained four charges, with four specifications each. Twelve of the sixteen specifications were based on acts allegedly committed between "on or about" July 18, 1990, and "on or about" January 17, 1991. The remaining four specifications were based on acts allegedly committed after January 23, 1991. The charges were received by the summary court-martial convening authority on January 23, 1996, tolling the running of the UCMJ's statute of limitations under Article 43(b)(1), which provides:

> Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

The charges were referred to a general court-martial.

At trial, appellant moved to dismiss the twelve specifications alleging offenses in 1990, citing the 5-year statute of limitations in Article 43(b)(1).[1] The Government acknowledged that more than 5 years had transpired between the dates of the alleged offenses and receipt of charges by the summary court-martial convening authority, but it argued that the period of 8 months and 2 days in which appellant's motion challenging the subpoena was pending in

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[1] Appellant's motion and this appeal do not affect the validity of the specifications concerning acts committed after January 23, 1991.

federal district court should be excluded under the RFPA. The relevant provision of that statute reads:

> If any individual files a motion or application under this chapter which has the effect of delaying the access of a Government authority to financial records pertaining to such individual, any applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided.

12 USC § 3419. If the period of the litigation in federal district court is excluded, the charges were timely filed with the summary court-martial convening authority within the 5-year period provided in Article 43(b)(1).

The military judge, however, declined to apply the tolling provisions of the RFPA, relying primarily on two grounds. First, he ruled that Article 43 exclusively "controls the issue of what, if any, periods of time are subtracted

from computation of the statute of limitations . . . ," and no language in Article 43 permits consideration of the RFPA to toll the running of the statute. Second, he ruled that, even if § 3419 of the RFPA did apply, the time period during which appellant's challenge was under consideration did not toll the running of the statute. He stated that appellant's challenge "did not have the effect of delaying governmental access to the subpoenaed records" because the Government could have obtained access through appellant's former wife, who was a joint owner of the bank accounts in question, without invoking the RFPA.

On the Government's appeal of this ruling, the Court of Criminal Appeals disagreed with the reasoning of the military judge. With respect to the relationship between the tolling provisions of the RFPA and Article 43, the court concluded that "both the Right to Financial Privacy Act and the applicable statute of limitations [Article 43(b)(1)] are shields and not swords, and, having picked up both, appell[ant] is without a free hand to assert one over the other." 46 MJ at 848.

Second, as to whether appellant's challenge to the subpoena actually delayed the investigators' access to the bank accounts, the court held that the military judge had "applied the wrong legal standard." *Id.* at 848. The court reasoned that any "requirement for the use and failure of extrajudicial methods [to obtain the accounts through appellant's former wife] is simply inconsistent with the statutory scheme and fundamental fairness for both parties. The Government followed the rules, and we commend rather than second-guess. 46 MJ at 849 (citation omitted).

II

The primary question in this case is whether servicemembers may avail themselves of the protection of the RFPA and, if so, what effect such action has on application of Article 43(b)(1), the statute of limitations in the Uniform Code of Military Justice.

A

Under the Constitution, "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including

regulations, procedures, and remedies related to military discipline'" *Weiss v. United States*, 510 U.S. 163, 177, 114 S.Ct. 752, 760, 127 L.Ed.2d 1 (1994); *see* U.S. Const. Art. I, § 8, cl. 14. While members of the armed forces are not excluded from the protections of the Constitution, "the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974).

The Uniform Code of Military Justice represents the primary expression of congressional action on the subject of military discipline. The Code establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts. *Compare* Title 10, U.S. Code, Chapter 47, *with* Titles 18 and 28, U.S. Code. Although there are many similarities between military and civilian criminal proceedings -- including a general direction to apply civilian procedures that are not contrary to or inconsistent with the Uniform Code, *see* Art. 36(a), UCMJ, 10 USC § 836(a) -- and although military appellate decisions frequently look to parallel civilian

statutes for guidance, the systems are separate as a matter of law. Title 18 amendments to the Federal Criminal Code, changes in the Federal Rules of Criminal Procedure, and revisions of the Federal Rules of Evidence do not directly affect proceedings under to Uniform Code of Military Justice except to the extent that the Code or the Manual for Courts-Martial specifically provides for incorporation of such changes. *See, e.g.*, Arts. 36 and 134 (clause 3), UCMJ, 10 USC §§ 836 and 934, respectively; Mil.R.Evid. 101(b)(1), Manual for Courts-Martial, United States (1995 ed.).

Because we traditionally have viewed the Uniform Code of Military Justice as Congress' primary expression of the rights and responsibilities of servicemembers, we have been cautious about applying statutes outside the Code to the conduct and review of court-martial proceedings. We have not turned a blind eye, however, to all statutes outside the Code.

The interplay between the Uniform Code and other statutes is illustrated by application of the All Writs Act, 28 USC § 1651(a), to appellate tribunals under the Uniform Code of Military Justice. The All Writs Act provides that extraordinary

writs may be issued by "[t]he Supreme Court and all courts established by Act of Congress." A narrow reading of the UCMJ would preclude any proceedings in our Court subsequent to completion of direct appellate review. *See* Arts. 66, 67, and 76, UCMJ, 10 USC § 866 and 867 (1994), and 876, respectively. Nonetheless, in *United States v. Frischholz*, 16 USCMA 150, 36 CMR 306, 1966 WL 4467 (1966), this Court held that we had jurisdiction under the All Writs Act to consider a request for extraordinary relief, even though direct appellate review had long since been completed.

The authority of this Court to exercise jurisdiction under the All Writs Act has been recognized by the Supreme Court, *Noyd v. Bond*, 395 U.S. 683, 695 n.7, 89 S.Ct. 1876, 1883, n. 7, 23 L.Ed. 2d 631 (1969), and has been exercised in a wide variety of circumstances, including instances where this Court would not have had direct review of the proceedings. *E.g., United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 MJ 328 (CMA 1988). The authority of the

Courts of Criminal Appeals[2] to exercise jurisdiction under the All Writs Act also is well established. *Dettinger v. United States*, 7 MJ 216, 219 (CMA 1979); Rule 4(b)(1), Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces. Of particular note, our leading case applying the RFPA to protect members of the armed forces, *United States v. Curtin*, 44 MJ 439 (1996) -- which is discussed in Part IIB of this opinion -- is one in which appellate jurisdiction did not arise under the Uniform Code of Military Justice but, rather, involved a petition for extraordinary relief filed by the Government with the Court of Criminal Appeals under the All Writs Act.

While members of the armed forces do not enjoy the full panoply of constitutional and statutory rights available to others, they are no less citizens of the United States. In the absence of a valid military purpose requiring a different result, generally applicable statutes normally are available to protect servicemembers in their

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[2] Formerly the Courts of Military Review, see 41 MJ 213, 229 n..* (1994).

personal affairs. *Cf.* para. 14c(2)(a)(iii), Part IV, Manual, *supra*.

The interplay between military purposes and the private rights of servicemembers is illustrated by the manner in which this Court has considered the relationship between the federal wiretap statutes and proceedings under the Code. At the time the UCMJ was enacted, the Supreme Court's prevailing doctrine held that use of a wiretap to obtain evidence of a telephone conversation did not violate the Constitution. *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).[3] Congress subsequently enacted 47 USC § 605 as part of the Federal Communications Act, which established a restriction on use of such intercepted communications. The President, in the Manual for Courts-Martial, United States, 1951, provided that wiretap evidence would be inadmissible in courts-martial if obtained under conditions that would prohibit its use in a United States District Court. In *United States v. Noce*, 5 USCMA 715, 19 CMR 11, 1955 WL 3397 (1955), our Court

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[3] *Olmstead* was overruled by *Katz v. United States*, 389 U.S. 347, 353 (1967).

declined to apply the seemingly unrestricted statutory prohibition in § 605 to an on-post telephone system. Chief Judge Quinn stated:

> We are of the opinion that a self-contained military communications system is not the kind of system intended by Congress to be included under the provisions of Section 605. Although a particular subject may affect both the civilian and military communities, basic differences between the two frequently require and legally justify a difference in treatment. It requires no elaborate recitation of reasons to emphasize the need in the military establishment for close supervision and control over its own communication systems. . . . This was undoubtedly appreciated by Congress. And, it seems to us that Congress would not restrict the power of the military establishment without a specific declaration to that effect.

5 USCMA at 721, 19 CMR at 17 (citation omitted).

In light of subsequent developments in applicable constitutional doctrine,[4] as well as revisions in the applicable statutes[5] and the Manual for Courts-Martial,[6] we express no opinion on the continued vitality of the specific holding in *Noce*, but we emphasize that the analytical framework in that case remains valid. *Noce* provides a useful reminder that a generally applicable statute must be viewed in the context of the relationship between the purposes of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to

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[4] *See* n.3, *supra*.

[5] *See* 18 USC section 2510-2522; *see generally Chandler v. U.S. Army*, 125 F.3d 1296, 1299 (9th Cir., 1977) (Although federal wiretap laws do not expressly mention the military departments, "[t]here is no exception in the law for the Army.").

[6] *See* Mil.R.Evid. 317 ("Interception of wire and oral communications").

military personnel and court-martial proceedings.

B

In the present case, we first must consider whether members of the armed forces in the circumstances of this appellant are covered by the protections of the RFPA. In a notable similarity to the wiretap law, the RFPA had its origin in a Supreme Court decision denying application of the Fourth Amendment to a particular form of search and seizure. In *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), the Supreme Court held that customers of a bank have no Fourth Amendment expectation of privacy in the bank's records of the customers' financial transactions. Under *Miller*, as a matter of constitutional law, NCIS agents and DoD IG investigators could have seized appellant's bank records without either his knowledge or his consent.

In "response" to the *Miller* decision, however, Congress decided to provide a significant degree of statutory protection for a customer's bank records. *See* H. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), *reprinted in* 1978 U.S. Code Cong.

& Admin. News 9273, 9306. The result was passage in 1978 of the RFPA, 12 USC §§ 3401-3422, which prohibits the Federal Government from obtaining such records from financial institutions unless the customer consents (§ 3404) or the Government pursues one of the following four procedural options: an administrative subpoena (§ 3405), a search warrant (§ 3406), a judicial subpoena (§ 3407), or a formal written request (§ 3408). 12 USC § 3402.

If the Government seeks to obtain the records through a search warrant, the customer's rights are protected by the requirement that the Government must proceed under the Federal Rules of Criminal Procedure. § 3406(a). However, no notice of access to the records is required until at least 90 days after the warrant is served. § 3406(b) and (c). If the Government seeks to invoke one of the other options, the RFPA contains specific procedures to protect the individual's privacy interests. Each customer listed on the account must be notified that the Government has requested access to his or her records. *See* 12 USC §§ 3405(2), 3407(2), and 3408(4). If the customer does not contest the Government's access, then the financial institution may turn

over the records. If the customer decides to challenge the Government's access to the records, however, then the customer may file a motion in the appropriate United States District Court to prevent the Government from gaining access to the records. *See* 12 USC § 3410; *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745, 104 S.Ct. 2729, 2726-27, 81 L.Ed.2d 615 (1984); *McDonough v. Widnall*, 891 F.Supp. 1439, 1448 (D. Colo. 1995). As noted above in Part I, if the individual files such a motion, "which has the effect of delaying the access of a Government authority" to the records, "any applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided." 12 USC § 3419 (emphasis added).

The statutory provisions in the RFPA embody an express congressional determination that a person who receives notice of a subpoena must make a choice: either acquiesce in the Government's statutory authority to access the records (§ 3402) or invoke the statutory proceedings to contest the access, recognizing that "any applicable" statute

of limitations will be tolled during the pendency of the ensuing litigation.

The RFPA applies to access to customers' financial records by any "Government authority," § 3502, a term that is defined broadly in § 3401(3) as including "any agency or department of the United States, or any officer, employee, or agent thereof[.]" Reflecting congressional understanding that it could affect national security matters, the RFPA contains a limited exemption for "a Government authority authorized to conduct foreign counter - or foreign positive-intelligence activities." 12 USC § 3414(a)(1)(A). The Act also sets forth a variety of exceptions for other government activities, *see* 12 USC § 3413, but provides no exemption for the Department of Defense in general or for military disciplinary matters in particular. *Cf.*, *e.g.*, 5 USC § 551(1)(F) (exclusion of courts-martial from coverage under the generally applicable provisions of the Administrative Procedure Act).

The Department of Defense has not attempted to exclude military personnel from the protections of the Act. On the contrary, following enactment of the legislation, DoD issued a regulation that

"implements" RFPA. Department of Defense Directive 5400.12, "Obtaining Information from Financial Institutions," § A (Feb. 6, 1980). The Directive, which "appl[ies] to the Office of the Secretary of Defense, the Military Departments, the Defense Investigative Service, and the National Security Agency," § B.1, provides guidance to DoD investigators, including the agents who sought the subpoena and issued the notice to appellant in this case.

Our Court recently has applied the RFPA to protect the privacy interests of members of the armed forces. Our decision in *United States v. Curtin*, 44 MJ 439 (1996), concerned judicial review of subpoenas for financial records issued by trial counsel under § 3407 of the RFPA. In *Curtin*, trial counsel provided notice to the accused's wife and her father, the subjects of the subpoena, who filed a motion at appellant's court-martial challenging the subpoena. *Id.* at 440. The military judge in *Curtin* ruled that the subpoenas were not judicial subpoenas covered by §§ 3407 and 3410 but were administrative subpoenas, which could be reviewed only by a United States District Court under § 3410(a).

We unanimously held that the military judge had jurisdiction to consider the validity of the subpoenas on the grounds that subpoenas issued under Article 46 and RCM 703 were judicial in nature, which thereby provided the servicemember with the right to judicial review under the RFPA (§ 3410(a)) by the court under whose authority the subpoenas had been issued -- the court-martial. We had no hesitancy in applying the RFPA to protect the financial privacy interests of members of the armed forces.[7]

Appellant in the present case has not provided us with any basis for concluding that we were incorrect in *Curtin*, or any basis for concluding that the RFPA

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[7] In *McDonough v. Widnall*, 891 F. Supp. 1439 (D. Colo. 1995), the district court found numerous violations of the RFPA by the Air Force in obtaining bank records of an Air Force officer. Although the opinion suggested that the district courts have exclusive jurisdiction over challenges under the RFPA, *id.* at 1446-47, 1448, the district court did not have the benefit of our opinion in *Curtin*. The import of *McDonough*, for purposes of the present case, is its application of the RFPA to protect the financial privacy interests of members of the armed forces.

excludes members of the armed forces from its protection of financial privacy interests. As a matter of law, we conclude that the RFPA has covered applicable financial records of members of the armed forces since it was enacted in 1978.

III

The second issue we must consider is the relationship between Article 43 of the UCMJ -- which provides a statute of limitations "[e]xcept as otherwise provided in this section (article)" -- and the tolling provision in RFPA, which in plain language applies to "any applicable statute of limitations." 12 USC § 3419.

Congress is not required to use specific language when enacting new legislation that has the effect of modifying prior legislation, including prior legislation that appears on its face to admit of limited or no exceptions. There is no legal requirement that Congress, in establishing a law with comprehensive effect, specifically amend all previously enacted legislation that it intends to affect. The question in each case is whether the new legislation can be fairly read to modify a prior statute.

The answer depends on a number of factors, including: (1) whether the subsequent statute applies in general to circumstances governed by the prior statute; (2) whether failure to apply the challenged portion of the subsequent statute would be inconsistent with the statutory framework of the subsequent statute; and (3) whether application of the subsequent statute would be inconsistent with the statutory frame work of the prior statute.

With respect to the first factor, as we have noted in Part IIB, the subsequent statute -- the RFPA -- applies in courts-martial to protect the financial privacy interests of members of the armed forces. With respect to the second factor, failure to apply the tolling provision in courts-martial would mean that members of the armed forces would have the benefit of the RFPA -- including the ability to challenge subpoenas in federal district courts -- without the concomitant consequences of tolling the statute of limitations. Under these circumstances, servicemembers could convert the authority to litigate the validity of a subpoena, which was designed by Congress as a shield, into a sword that could sever the possibility of a court-martial when, as in this case, the

litigation was of sufficient duration to extend beyond the basic statutory period of limitations. There is no reason to believe that Congress intended the RFPA to exempt servicemembers from accountability for misconduct when their civilian counterparts who invoked the same statute in similar circumstances would be required to defend against criminal charges. On the contrary, the statutory framework reflects a direct link between the opportunity to challenge the subpoena and the assurance that the Government will not be precluded from pursuing a criminal charge as a result of the delay occasioned by such a challenge.

With respect to the third factor, we note that this is not a case involving a fundamental principle of military law that admits of no exceptions. On the contrary, Article 43 is filled with exceptions and exclusions from the basic statute of limitations. Adding one more exception has no effect on the basic framework of military law.

The critical aspect of § 3419 with respect to the UCMJ is that § 3419 only affects "any applicable statute of limitations." If the RFPA did not protect the financial privacy interests of

servicemembers when subject to military investigations, then we might be hesitant to conclude that other broadly worded language concerning statutes of limitations will affect Article 43. In this case, given the limitation that the tolling provision only applies to "applicable statutes of limitations," we have no reservation about applying it to circumstances in which servicemembers are authorized to use the shield of the RFPA to challenge subpoenas related to military investigations.

In view of these factors, we conclude that the RFPA, when enacted in 1978, permitted servicemembers to challenge applicable subpoenas in the federal district courts, with the concomitant effect of tolling the applicable statute of limitations in Article 43 during the pendency of such litigation.

IV

Eight years after passage of the RFPA, Congress modified Article 43 by increasing the basic statute of limitations from 3 to 5 years and modifying the phrasing of certain exceptions. Congress made no change, however, in the prefatory language,

providing that the basic statute of limitations applied "[e]xecpt as otherwise provided in this section (article) . . ." Pub.L. No. 99-661, § 805, 100 Stat. 3908 (Nov. 14, 1986). The military judge took note of the 1986 amendment and apparently concluded that, even if Congress initially had intended the 1978 enactment of the RFPA to apply to courts-martial, the 1986 amendment to Article 43 precluded application of the tolling provision because Congress reenacted the reference to exceptions "in" Article 43.

We do not agree. The legislative history of the 1986 amendments makes clear that Congress intended to reenact Article 43 with modifications directed solely at the length of the basic statute of limitations and the phrasing of the exceptions within the Article. *See* S.Rep. No. 331, 99th Cong., 2d Sess. 249-50 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 6444-45. There is no indication that Congress gave any consideration to the relationship of Article 43 to other statutes. Unless we were to hold that servicemembers cannot exercise any of the beneficial provisions of the RFPA -- which we decline to do for the reasons noted in Part II -- we could sustain the ruling of the military judge

only by holding that Congress intended in 1986 to repeal application of the tolling provisions in § 3419 while leaving servicemembers free to delay proceedings by filing challenges to RFPA subpoenas in federal district court that could have the effect of delaying military justice proceedings past the applicable statute of limitations. Regardless of the circumstances which might justify application of the doctrine of repeal by implication, we decline to apply it in these circumstances where to do so would undermine the basic framework of the statute at issue, the RFPA.

V

We recognize that the Uniform Code of Military Justice is a special, well-integrated statute, and we exercise great caution in overlaying a generally applicable statute specifically onto the military system. Under the circumstances discussed above, however, we are persuaded that Congress intended that § 3419 of the RFPA toll the running of all applicable statutes of limitations, which clearly includes Article 43(b)(1), during a judicial challenge to a subpoena. In particular, we note the unambiguous language in RFPA; the circumstances of the

legislative history; the contemporaneous implementation of the RFPA by the Department of Defense and the military departments; and judicial application of the RFPA generally to servicemembers. We decline now to deprive military personnel of these important privacy rights; and we decline, further, to create a special status for military personnel, whereby they could use the RFPA as a sword to bar criminal liability in situations in which their civilian counterparts could not do so. A citizen, whether military or civilian, cannot claim coverage of the RFPA to protect against intrusion by the Government into his private records while, at the same time, disclaim coverage of the RFPA to toll the running of a statute of limitations during his exercise of the very process under the statute by which he or she claims that protection.

VI

Appellant urges us to adopt the alternative holding of the military judge to the effect that, even if RFPA fully applies, the challenge to the subpoena filed by appellant did not "ha[ve] the effect of delaying the access" of the Government to his financial records, which

is a requirement of § 3419. The military judge held that, since appellant's wife was a joint account holder and since she alerted investigative authorities to the alleged fraudulent claims, the Government authorities could have obtained access to the financial records through her. From this speculation, the military judge concluded that the delay was not caused by appellant's filing but through the Government's failure to obtain the records from appellant's wife.

There is nothing in the record demonstrating that the wife in fact would have consented to the Government's request for access to the records. We are all too familiar with cases in which a criminal complaint is initiated by a spouse who subsequently changes his or her testimony, declines to testify, or refuses to provide consent to a search due to a change of heart. In any case, however, we do not regard such possibilities as determinative. The RFPA does not require investigators to seek alternative sources of access to records before obtaining a subpoena. *See United States v. Wilson*, 571 F. Supp. 1417, 1420-21 (S.D.N.Y. 1983). On the contrary, while investigators are not precluded from seeking alternative sources, the entire

thrust of the legislation and implementing directives is to establish formal procedures to protect the financial privacy rights of individuals through notice of proposed access and a formal opportunity to challenge.

Here, appellant urges us to fault the investigators because they proceeded in accordance with rules designed to protect his rights. We find nothing in the statute or its legislative history that would lead us to interpret the statute in a manner that would eviscerate the privacy protections that Congress consciously and carefully created. We decline to adopt a holding that would have the effect of encouraging law enforcement investigators to pursue back-door and side-door access to bank records, *see* n.7, *supra*, rather than to seek such records openly under the RFPA, which provides the owner of those records a process to attempt to maintain confidentiality.

VII

When appellant affirmatively invoked the protections of the RFPA in an effort to block government access to his financial records, he submitted himself to

the integrated provisions of that statute, including the provision under which the applicable statute of limitations was tolled. Appellant does not dispute the fact that if the 8-month period in which his judicial challenge to the subpoena was pending is excluded, running of the UCMJ statute of limitations was terminated prior to expiration of the 5-year period specified in Article 43. Because we conclude as a matter of law that the 8-month period should be excluded, we hold that Article 43 does not bar trial on any of the specifications now pending against appellant.[8]

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[8] Contrary to the suggestion in the dissent, this is not a case involving a belated attempt by prosecutors to salvage time-barred charges by combing the United States Code to dredge up a remote banking statute and thereby "circumvent" the military's statute of limitations. This is a case in which a person subject to the Uniform Code of Military Justice affirmatively sought the protection of another federal statute to limit the scope of a military investigation. He cannot now pick and choose which of those provisions he wants to apply to him.

The dissent also suggests that Congress is constitutionally precluded

from applying to the armed forces a provision that generally restricts statutes of limitations unless the statute expressly refers to the armed forces. Although the presence or absence of a reference to the armed forces may be useful on a question of statutory interpretation, the dissent cites no authority for the proposition that, as a matter of constitutional law, Congress cannot affect the rules and regulations for the government of the armed forces through a generally applicable statute. Moreover, even assuming that the dissent is correct in asserting that the primary constitutional basis for enactment of the RFPA is the Commerce Clause, U.S. Const., Art. I, section 8, cl. 3, that is a very different matter from concluding that Congress is disabled from ensuring that the purposes of the legislation are furthered by limitations -- including those in both civilian and military tribunals. *See* U.S. Const., Art. I, section 8, cl. 18 (congressional power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.") In that regard, we note that even though the primary source of authority for the All

VIII

The decision of the United States Navy-Marine Corps Court of Criminal Appeals, setting aside dismissal of 12 specifications, is affirmed. The record of trial is returned to the Judge Advocate General of the Navy for remand to the military judge for further proceedings.

Judges CRAWFORD and GIERKE concur.

SULLIVAN, Judge (concurring in part and in the result):

I completely agree with the excellent opinion of my learned Brother, Judge Effron, in affirming the decision below setting aside the military judge's dismissal of the relevant specifications. I write separately only to observe that a common sense construction of the federal statutes at issue and notions of basic fairness allow tolling the statute of limitations in this case.

Writs Act, 28 USC section 1651(a), may be found in Article III of the Constitution, that has not precluded application of All Writs Act to proceedings under the UCMJ. *See* Part IIA, *supra*.

The narrow view of the dissent in its cry to restrict justice in the military to "within the four corners of the Articles of War and, more recently, if indeed 47 years is recent, the Uniform Code of Military Justice," 47 MJ at 113, seems to be an extreme position for a Judge on a modern Federal court which is tasked by Congress to oversee the military justice system. His dissent in my opinion is like finding a fresh dinosaur footprint among four M1A1 tank tracks on a tank trail at Fort Hood, Texas.

Of course, our Court may look outside the UCMJ to do justice in a case. For example, regularly do we apply the Constitution and the Bill of Rights to the cases of our service men and women. Indeed, Article 36(a), UCMJ, 10 USC § 836(a), specifies that "the principles of law . . . generally recognized in the trial of criminal cases in the United States District Courts" be applied to cases under the UCMJ.

One of our Presidents, who had a special compassion for our military, was

Theodore Roosevelt.[9] He wanted the military to be treated equally with all citizens and proclaimed, "A man who is good enough to shed his blood for the country is good enough to be given a square deal afterwards. More than that no man is entitled to, and less than that no man shall have." (Speech, Springfield, Illinois, June 4, 1903.)

The dissent must realize that, subject to military necessity and the specific dictates of Congress, the Constitution and all laws of the United States apply to the military. Servicemembers are citizens of the United States and subject to the full weight and protection of its laws unless excluded by the Constitution or limited by Congress. The military is not the 51st state. Our military is governed by the Law of the Land.

COX, Chief Judge (dissenting):

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[9] Theodore Roosevelt was the first President to go underwater in a submarine (the USS PLUNGER). After he came up, he was impressed with the dangers of the "silent service" and authorized hazardous-duty pay for submariners- a benefit which continues today.

For over 192 years, military justice laws regarding statutes of limitations have been contained within the four corners of the Articles of War and, more recently, if indeed 47 years is recent, the Uniform Code of Military Justice. My colleagues, without hesitation or remorse, expand the reach of military justice law by assimilating 12 USC § 3419 into Article 43, Uniform Code of Military Justice, 10 USC § 843. Because I am convinced that the Uniform Code of Military Justice is the exclusive body of law governing the limitation on the exercise of court-martial jurisdiction, I respectfully dissent.

Statutes of limitations create seemingly intolerable results as the party who successfully pleads the statute as a bar to prosecution, indeed, escapes prosecution. Thus, quite naturally prosecutors eagerly seek avenues to circumvent the plain language of such statutes. There is nothing new about the Government's effort to enlarge the limitations via statutory construction. colonel Winthrop in his seminal work on military law made the following observation regarding various efforts to enlarge by statutory interpretation the then-existing Statute of Limitations found

in Article 103 of the Articles of War (1806 as amended in 1890):

> It will thus be seen that the military statute of limitations admits of no exceptions to its operation other than such as are indicated in the statute itself.

W. Winthrop, Military Law and Precedents 258 (2d ed. 1920 Reprint).

Let there be no mistake. The issue presented by this case is about assimilating, without express statutory language, a remote federal statute of limitations into the Uniform Code of Military Justice. This is a significant departure from the traditional approach of statutory construction of the military statute of limitations. I do not view the broad approach undertaken by my colleagues as either desirable or necessary to carry out the principal purposes of the Uniform Code of Military Justice.

The majority opinion makes an eloquent case for its unprecedented expansion of Article 43. Indeed, when you read that opinion, you get a warm feeling that it is the right thing to do. It

seems just and proper that we toll the statute of limitations against this appellant, because it must be said that he availed himself of the procedural protections of the Right to Financial Privacy Act, 12 USC §§ 3401-3422. How can he now be heard to complain that the statute of limitations found in Article 43 was tolled while he sought the protection of the courts from the governmental search of his bank accounts?

This approach, however, begs the question: Can we, or should we, look without the Uniform Code of Military Justice to find laws to expand the statute of limitations on prosecutions of offenses committed by military members?

It seems prudent for us to reflect upon our genesis. From whence comes the congressional authority to regulate the armed forces? From whence comes the authority which permits Congress to enact rules regarding the right to financial privacy in bank-account records?

I find that Article I, § 8, Clause 14, of the Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." Likewise, Article I, § 8, Clause 3,

provides the authority to "regulate Commerce. . . among the several States," which power has long since been construed to permit Congress to provide for reasonable regulation of financial institutions engaged in interstate commerce or availing themselves of various federal programs such as the Federal Deposit Insurance Corporation (FDIC). Title 12, §§ 3401-3422, was enacted under the latter authority. Article 43 of the Uniform Code was enacted under the former. Unless Congress makes clear that it is enacting a statute designed for the "Government and Regulation" of the armed forces, I am reluctant to construe a remote statute clearly designed to accomplish some purpose other than to regulate the armed forces as being applicable to trials by courts-martial.

Accordingly, I would uphold the ruling of the military judge to dismiss the three specifications in each charge as being barred by Article 43(b)(1), UCMJ, 10 USC § 843(b)(1).

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

P.J. McLAUGHLIN K.T. SEFTON
LARRY D. WYNNE

UNITED STATES

v.

Thomas W. DOWTY, 307-66-4647
Lieutenant (0-3), U.S. Navy

NMCM 96 01535
Decided 6 May
1997

Sentence adjudged 25 July 1996. Military Judge: R.L. Rodgers. Review pursuant to Article 62, UCMJ, of General Court-Martial

convened by Chief, Bureau of Medicine and Surgery, Washington, D.C.

LT JOHN J. LUKE, JAGC, USNR, Appellate Defense Counsel

LT RANDY S. KRAVIS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WYNNE, Judge:

This case is before us on an appeal by the United States in accordance with Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (1994) [hereinafter UCMJ]. The Government asserts that the military judge improperly dismissed several specifications "by reason of the running of the statute of limitations."[1] We agree; this court-martial may proceed as to all charges and

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[1] Record, Appellate Exhibit VIII. The military judge did an admirable job of setting out the relevant facts and the authority upon which he relied. We have attached his efforts, Appellate Exhibit VIII, and refer to it hereinafter as Appendix I.

specifications referred for trial. RULE FOR COURTS-MARTIAL 908(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter R.C.M.]. In the interest of economy, we act on two pending motions and set out our rationale below.

On 14 March 1997, and again on 17 April 1997, the Government asked this court "to decide this case as expeditiously as possible." Government Motion for Expedited Review of Government Appeal and Government Second Motion for Expedited Review of Government Appeal. To the extent today's decision satisfies that request, the Government's motions are granted.[2]

The singular issue before us is the effect of the delay occasioned by appellee's invocation of his right to challenge a subpoena issued by the

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[2] Our duty in this matter is clear. Art. 62, UCMJ, 10 U.S.C. § 862 and R.C.M. 908. "The assurance that motions to ... dismiss... are correctly decided through orderly appellate review safeguards both the rights of defendants and the 'rights of public justice.'" *United States v. Loud Hawk*, 474 U.S. 302, 313, (1986) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

Government under the Right to Financial Privacy Act on the statute of limitations applicable to his trial by court-martial. 12 U.S.C. §§ 3401-3422; Art. 43, UCMJ, 10 U.S.C. § 843. Our decision today, as a matter of law and practice is the reconciliation of the two applicable statutes. Art. 62, UCMJ, 10 U.S.C. § 862(b).[3]

The statutes of concern are not disputed. Our generally applicable statute of limitations provides:

> Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an

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[3] The Right to Financial Privacy Act has been generally applied to courts-martial by both our superior court and other Federal courts. *See United States v. Curtin*, 44 M.J. 439 (1996), and *McDonough v. Widnall*, 891 F. Supp. 1439 (1995). To the extent that *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992), might be read to contrary, *Curtin*, sets the record straight.

> officer exercising summary court-martial jurisdiction over the command.

Art. 43(b)(1), UCMJ, 10 U.S.C. § 843(b)(1).

The Right to Financial Privacy Act provides:

> If any individual files a motion or application under this chapter which has the effect of delaying the access of a Government authority to financial records pertaining to such individual, any applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided.

12 U.S.C. § 3419.

Nor is there any dispute that the period required for resolution of the appellee's application and motion under the Right to Financial Privacy Act, by the District Court for the District of

Columbia, totaled 8 months and 2 days.[4] The only dispute involves the effect of this delay. The military judge correctly concluded:

> 24. That if this eight months and two days is subtracted from the period of time from the date the first three actions were allegedly committed by the accused to the date the sworn charges and specifications were received by the officer exercising summary court-martial jurisdiction, the amount of time which expired from the first three actions until receipt of sworn charges by the officer exercising summary court-martial jurisdiction occurred is less than five years. (The applicable statute of

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[4] *Dowty v. Department of Defense*, No. 94-2015 (D.D.C. May 17, 1995) (Order denying Petitioner's Motion to challenge Government's Access to Financial Records). Appellate Exhibit III to the record of trial contains a copy of this order and the supporting documentation upon which the district court relied in deciding appellee's motion.

limitations was tolled and has not run.)

25. That conversely, if this eight months and two days is not subtracted, the amount of time from each of the first three actions allegedly committed by the accused until receipt of sworn charges by the officer exercising summary court-martial jurisdiction is in excess of five years. (The applicable statute of limitations has run.)

Appendix I. [Appendix C herein.]

In dismissing charges by reason of the running of the statute of limitations, the military judge viewed the two applicable statutory schemes as either-or propositions and elected to enforce one at the expense of the other. Appendix I. [Appendix C herein.] This approach is a straightforward extension of the practical question presented, and it is understandable given the zigzag course we have followed in defining the relationship between the Uniform Code of Military Justice and the remainder of the United

States Code.[5] The train-wreck model is, however, fundamentally flawed.

In deciding that the last-passed statute controlled by its own language, the military judge implicitly relied on statutory construction, legislative intent, and implied repeal.[6] Undoubtedly,

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[5] Confusion, created by a code within a code, existed even at the birth of our modern Uniform Code of Military Justice, 10 U.S.C. § 801-946 (1994). Article 134, UCMJ, 10 U.S.C. § 934, envisions the use of other sections of the United States Code, but the legislative history also includes an expression of doubt that some sections of the United States Code might not be applicable to court-martial cases. S.Rep. No. 81-486 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222.

[6] Murphy's Law of Statutory Construction might be expressed: "For every maxim there is an equal and opposite maxim." *See generally* PAUL DICKSON, THE NEW OFFICIAL RULES (1989). And even after choosing one, the application of maxims is not always helpful. For example, given the facts that the statutes leapfrog one another, it is difficult to conclude what might have repealed what. Appendix I details the effective dates of the statutes in question.

in a free society, ambiguities in criminal statutes "should be resolved in favor of lenity." *Rewis v. United States,* 401 U.S. 808, 812 (1971). As a corollary, limitations on prosecution must be liberally interpreted in favor of repose. *United States v. Scharton,* 285 U.S. 518 (1931); but *see Badaracco v. Commissioner of Internal Revenue,* 464 U.S. 386 (1984)(suspension of the statute of limitations reconciled with other applicable statutes). We cannot disagree that the legislative intent known to us is at best a cross wind, or that reasonable minds might differ on these lesser questions.[7] But the trial judge overlooked the cardinal principle.

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible . . . It is not sufficient, as

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[7] In the absence of the cardinal principle we now apply, we would be inclined, as a matter of law and policy, to give deference to the trial bench. *United States v. Burris,* 21 M.J. 140, 144 (C.M.A. 1985).

> was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new and those of the old . . . .

United States v. Borden Co., 308 U.S. 188, 198-99 (1939).

The trial judge perceived a statutory conflict from contrary factual results, and implicitly applied the doctrine of implied repeal to resolve that conflict. *See* Appendix I.[Appendix C herein.][8] The

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[8] Of course, it is also possible that the military judge simply gave greater weight to Article 43, UCMJ, 10 U.S.C. § 843, because this trial is a court-martial. If that was the case, we also reject any implication or inference that the provisions of Title 10 have some greater or lesser authority in courts-martial than applicable statutes catalogued elsewhere. Most of the

law requires, however, that we inductively construe the statutes in question in order to apply them rather than deductively eliminating one of them.[9]

> For it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

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statutes applicable to courts-martial are found in Title 10 of the United States Code, although some are located elsewhere. *Compare* Art. 1, UCMJ, 10 U.S.C. 801 with 28 U.S.C. § 1259. A statute's "position in the code" may help us construe it. *United States v. Harries*, 220 F. Supp. 289 (D. Md. 1963). But no statute may gain in value simply from its location; otherwise we might just as well give greatest dignity to Title 37 because it authorizes our pay. 37 U.S.C. § 204.

[9] Even the comity among our Federal courts with regard to courts-martial is a product of this inductive approach. *See Schlesinger v. Councilman*, 420 U.S. 738 (1975) (conspicuously contrary jurisdictional statutes, 10 U.S.C. § 876 and 28 U.S.C. § 1331, read in accord with one another).

> Rather, the legislative intent to repeal must be manifest in the "positive repugnancy between the provisions." *United States v. Borden Co.*, 308 U.S. 188, 199 (1939).

United States v. Batchelder, 442 U.S. 114, 122 (1979).

The lesser rules of internal statutory construction, such as the favor shown leniency and repose, simply do not apply. *See Rewis*, 401 U.S. at 812; and *Scharton*, 285 U.S. at 522.[10]

We would be not be satisfied with this mechanical approach if it were inconsistent with constitutional or other historical safeguards, but this is not the case. *See generally United States v.*

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[10] And even if they did, other applicable principles of statutory construction, [sic] might produce a different result. For example, when statutes are construed "*in para materia*" the specific governs the general. *See Russell v. Widnall*, 915 F. Supp 1108, 1116 (D. Colo. 1996). But which statute is the more specific?

Zamberlan, 45 M.J. 491 (1997) (Sullivan, J., concurring in the result). Neither of the statutes before us has a constitutional underpinning, and both are subject to waiver. *See United States v. Miller*, 425 U.S. 435 (1976); *Taliaferro v. United States*, 979 F.2d 1399 (10th Cir. 1992); 12 U.S.C. § 3408; and R.C.M. 907(b)(2)(B).

Expressed in classical rhetoric, we conclude that both the Right to Financial Privacy Act and the applicable statute of limitations are shields and not swords, and, having picked up both, appellee is without a free hand to assert one over the other. Said less dramatically, we are not uncomfortable with the *de facto* waiver inherent in our decision. *Compare United States v. King*, 30 M.J. 59, 66 (C.M.A. 1990) (accused cannot be responsible for or agreeable to a delay and then turn around and demand dismissal for the same delay) with *United States v. Salter*, 20 M.J. 116, 117 (C.M.A. 1985) (court would not impose upon an accused a waiver of the right to plead the statute of limitations).[11]

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[11] While we do not consider it dispositive, we note that appellee was represented by counsel in asserting his

In addition to his conclusion that the Right to Financial Privacy could not apply, the trial judge's findings and conclusions present one alternative theory. The military judge concluded:

> II. Alternatively, even if the [sic] Section 3419 of RFPA stops, for certain periods, the running of Article 43(b)(1) statute of limitations, the eight months and two days [sic] delay ... would not, in this case, be excludable delay under Section 3419 because the accused's filing of his motion [in the District Court] on 15 September 1994 did not have the effect of delaying governmental access to the subpoenaed records.

Appendix I. [Appendix C herein.]

The military judge applied the wrong legal standard in reaching his conclusion that the Government failed to meet the requirements of the Right to Financial

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right to financial privacy. Record, Appellate Exhibit III.

Privacy Act. We comment briefly for the sake of clarity.

Under the Right to Financial Privacy Act, the applicable statute of limitations, in this case Article 43, of the UCMJ, 10 U.S.C. § 843, is tolled during the pendency of challenges to government subpoena if the individual's, in this case the accused's, challenge to the subpoena "has the effect of delaying the access of a Government authority to financial records pertaining to such individual. . . ." 12 U.S.C. § 3419.

In applying the Right to Financial Privacy Act the military judge concluded that the Government must show, in addition to judicial delay, the failure of extrajudicial efforts to obtain the subpoenaed records. Specifically the military judge found that the Government did not attempt to obtain the records of the joint accounts in question from appellee's ex-wife. Appendix I. [Appendix C herein.] Absent this required showing that extrajudicial efforts would not have prevented delay, the military judge found that the requirement of the Right to Financial Privacy Act had not been met and dismissed the affected charges under the statute of limitations. The requirement

for extrajudicial efforts confuses the burden of proof, which the Government bears under the facts found, with the requirements of the statute under the facts presented. R.C.M. 905(c)(2)(B).

The military judge's findings of fact are not clearly erroneous; they are not erroneous at all, but they are not all the facts. The District Court for the District of Columbia found that the Government "complied with the Right to Financial Privacy Act." *Dowty v. Department of Defense*, No. 94-2015 (D.D.C. May 17, 1995) (Order denying Petitioner's Motion to Challenge Government's Access to Financial Records).

The use of financial records obtained in violation of the Right to Financial Privacy Act is unlawful. *McDonough v. Widnall*, 891 F. Supp. 1439 (1995). Financial records obtained using the creative methods required by the trial judge might not be excluded at trial. *See United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). But any requirement for the use and failure of extrajudicial methods is simply inconsistent with the statutory scheme and fundamental fairness for both parties. *See id.* at 148. The

Government followed the rules, and we commend rather than second-guess.

Accordingly, the trial judge's dismissal of Specifications 1, 2, and 3 of charges I, II, and III, and IV is set aside. Appellee's court-martial may proceed as to all charges and specifications referred for trial. R.C.M. 908(c)(3).

Senior Judge McLAUGHLIN and Judge SEFTON concur in result.

APPENDIX C

GENERAL COURT-MARTIAL
UNITED STATES NAVY
ATLANTIC JUDICAIL CIRCUIT

UNITED STATES

v.

Thomas W. DOWTY
Lieutenant Medical Service Corps.
U.S. Navy

MOTION TO DISMISS

FINDINGS OF FACT

29 JULY 1996

The motion brought by the defense was to dismiss Specifications 1, 2, and 3 of each of the Charges (I through IV) by reason of the running of the statute of limitations.

FINDINGS OF FACT

1. That on 28 September 1993, a confidential caller (later identified as Ms. Dorothy (Dowty) Cooprider, the accused's former spouse), called the Defense Fraud, Waste and Abuse Hotline and alleged that while the accused was assigned as the Finance Liaison Officer, Orthopedics Department, National Naval Medical Center, Bethesda, Maryland, from 1989 to 1992, he created a fictitious company called "Health Care Associates" through which vehicle the accused submitted false and forged claims against the government, resulting in payment by check of some $15,000 for services never rendered.

2. That at this time, the caller indicated that the accused had deposited government checks issued pursuant to this alleged scheme into his personal checking account at Home Federal Savings Bank (HFSB), Washington, D.C.

3. That initial contact (late 1993) with HFSB indicated that during the relevant period (1989-1992), the accused had two accounts with HFSB; one was a personal checking account, and one was in the name of Health Advisory Associates - both accounts were joint accounts in the names of the accused and Dorothy L. Dowty.

4. That on 27 July 1994, in Arlington, Virginia, the Department of Defense Inspector General, on behalf of the Naval Criminal Investigative Service (NCIS), the agency charged with the conduct of this criminal investigation, issued a subpoena pursuant to the right to Financial Privacy Act (RFPA) (12 U.S.C. Section 3401 *et. seq.*), to the Custodian of Records, HFSB, requesting that said institution produce "all accounts in the name of Thomas William Dowty, a U.S. Navy employee, and/or Health Care Associates" (emphasis added) for the time period 1 January 1989 - present.

5. That on 1 August 1994, NCIS forwarded the "subpoena customer notice" (per 12 U.S.C. Section 3410) to the accused's last known mailing address; said notice was returned without having been forwarded to the accused on 6 September 1994.

6. That said subpoena was served on HFSB on 24 August 1994; the subpoenaed records were not then made available to the government.

7. That on 9 September 1994, the accused was personally served said customer notice at the Naval Postgraduate School, Monterey, California.

8. That on 15 September 1994, the accused, through civilian counsel, filed a motion to challenge the government's access to the subpoenaed records.

9. That the accused's 15 September 1994 motion objected to governmental access to the "financial records of Thomas William Dowty" only.

10. That the accused's affidavit in support of his 15 September 1994 motion indicates that the accused sought to preclude governmental access to "bank records of Thomas William Dowty from 1 January 1989 to present."

11. That on 24 January 1995, Judge Thomas F. Hogan, U.S. District Court, District of Columbia, issued a show cause order requiring the accused to show cause why his challenge should not be dismissed.

12. That based on the accused's 13 February 1995 response to the show cause order, Judge Hogan ordered the government to respond to the accused's challenge to the government's access to the accused's financial records.

13. That on 21 February 1995, the government filed the affidavit of special

Agent V. M. Bradley, NCIS, in support of its desire for access to the accused's personal financial records and those of Health Care Associates.

14. That on 24 March 1995, the accused responded to the government's affidavit in support of its subpoena.

15. That on 17 May 1995, Judge Hogan dismissed the accused's motion to challenge access and ordered enforcement of the subpoena; said result was filed on 18 May 1995.

16. That Special Agent Bradley did not retrieve the subpoenaed documents from HFSB until 5 July 1995.

17. That the documents retrieved by Special Agent Bradley on 5 July 1995 came from joint checking accounts in the names of the accused and Ms. Dorothy L. Dowty.

18. That the accused and Dorothy Dowty were married prior to 1989 and were divorced 23 December 1992.

19. That there is no evidence of any ongoing investigative effort in subject case from 15 September 1994 - 5 July 1995.

20. That the individual "actions" allegedly committed by the accused (in furtherance of the scheme alleged above) were accomplished on 19 July 1990, 7 September 1990, 27 November 1990, and 25 February 1991, and resulted in the preferral of the instant charges against him.

21. That each action is pleaded (chronologically) as a violation of Articles 107, 121, 123, and 132, respectively, of the Uniform Code of Military Justice (UCMJ).

22. That the NCIS investigation in this case was completed on or about 15 December 1995; charges in this case were preferred on 17 January 1996; and, receipt by the summary court-martial convening authority of the preferred charges was accomplished on 23 January 1996.

23. That the amount of time from the accused's filing of his motion challenging governmental access to his personal financial records (15 September 1994) until the accused's challenge was denied (17 May 1995) was eight months and two days.

24. That if this eight months and two days is subtracted from the period of time from the date the first three actions were allegedly committed by the accused to the date the sworn charges and specifications were received by the officer exercising summary court-martial jurisdiction, the amount of time which expired from the first three actions until receipt of sworn charges by the officer exercising summary court-martial jurisdiction occurred is less than five years.

25. That conversely, if this eight months and two days is not subtracted, the amount of time from each of the first three actions allegedly committed by the accused until receipt of sworn charges by the officer exercising summary court-martial jurisdiction is in excess of five years.

APPLICABLE AUTHORITY

1. That Article 43(b)(1), UCMJ indicates that "Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command."

2. That Article 43 was amended in 1986.

3. That nowhere in Article 43 is there an exception which indicates that certain periods of time will not count toward the running of the statute of limitations "where otherwise allowed or directed by federal law."

4. That except for certain offenses (emphasis added) for which there is no limitation as to time, a person charged with an offense under the code may not be tried by court-martial over objection if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within five years" (discussion, R.C. M. 907(b)(2)(B)).

5. That per R.C.M. 905(c)(2)(B), the burden of persuasion as to the running of the statute of limitations is upon the government.

6. That 12 U.S.C. Section 3419 states that "If any individual files a motion or application under this chapter which has the effect of delaying the access of a Government authority to financial record pertaining to such individual, any

applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided."

7. That 12 U.S.C. Section 3419 was made part of federal law on 10 November 1978.

CONCLUSIONS

I. 1. That because of the specificity of the exceptions to the general five year statute of limitations stated in Article 43(b)(1), UCMJ, none of which pertain to this case, and because of the fact that Article 43, UCMJ was affirmed some eight years after the adoption of the RFPA, the Article 43 statute of limitations scheme controls the issue of what, if any, periods of time are subtracted from computation of the statute of limitations; and

2. That the government did not sustain its burden of proving that the statute of limitations was tolled as to Specifications 1 - 3 of Charges I - IV.

II. Alternatively, even if the [sic] Section 3419 of RFPA stops, for certain periods, the running of Article 43(b)(1) statute of limitations, the eight months and two days delay in retrieving the subpoenaed documents would not, in this case, be excludable delay under Section 3419 because the accused's filing of his motion on 15 September 1994 did not have the effect of delaying governmental access to the subpoenaed records. Both accounts from which documents were retrieved pursuant to the subpoena were joint accounts, to which Ms. Dowty - who reported these allegations in 1993, and who was a joint member of the accounts at HFSB - had access without the necessity of the government proceeding pursuant to RFPA. There being no evidence that the government was unaware of Ms. Dowty's identity in 1993, or that she refused to provide this assistance, thus necessitating the government's proceeding under RFPA, the government has not sustained its burden of proving that the statute of limitations with regard to the specifications under scrutiny has been properly tolled.

RULING

That the motion to dismiss Specifications 1, 2, and 3 of Charges I, II, III, and IV, is granted.